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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GEORGE LIEBENSPERGER, Defendant and Appellant.	B293320 (Los Angeles County Super. Ct. No. BA452205)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman J. Shapiro and Craig J. Mitchell, Judges. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie C. Brenan and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

George Liebensperger was convicted by jury on one count of battery upon a custodial officer in violation of Penal Code section 243.1.[1] Appellant contends he was not competent to stand trial and requests a limited remand for the trial court to conduct a retrospective competency hearing. He further contends that the imposition of fees and fines without determining whether he had the ability to pay violated his right to due process, pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). Although the trial court declared a doubt as to his competency after trial, we find no evidence to support appellant's contention that the court should have held a competency hearing before or during trial. We further conclude that appellant has waived his *Dueñas* claim. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2016, Liebensperger was housed in the Twin Towers Correctional Facility, which primarily houses mental health patients. Ephraim Udarbe worked as a custody assistant at the facility. One of his duties was to count the inmates in their cells.

Around 7:00 p.m. on May 31, 2016, Udarbe was counting the inmates when he saw that appellant's cell doors were covered with paper and trash bags so that no one could see into the cell. Udarbe knocked on the window and when there was no response, he thought there was a medical problem, so he opened the tray slot on appellant's door. When he opened the tray slot, appellant "gassed" Udarbe, throwing some type of liquid on him.[2] The liquid

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[1] Unspecified statutory references will be to the Penal Code.

[2] "Gassing" is a term used in the jail when an inmate throws a liquid such as urine or urine mixed with feces at staff members, usually using a milk or orange juice carton.

hit Udarbe in the face and dripped down his body, causing a burning pain in his eyes.

Deputy Antonio Salceda saw Udarbe walking toward him with his eyes shut tight and liquid on his face and hair. Salceda approached Udarbe, who told Salceda he had been gassed by cell seven. Salceda saw that the windows of cell seven were covered by trash and paper.

Sergeant Edward Fitzgerald was working at the Twin Towers Correctional Facility at the time, and he received a notification of an assault on a staff member. Fitzgerald went to appellant's cell and saw that the windows had been covered. He ordered appellant to remove the items from the windows, but appellant did not respond. Fitzgerald used a pepper spray fogger to try to convince appellant to comply because Fitzgerald wanted to enter the cell to look for evidence of the assault, such as a milk carton.

Appellant refused to comply, at one point saying that he would die before coming out of the cell. Fitzgerald interpreted this to mean that appellant wanted deputies to enter the cell and fight with him. After a psychologist and an extraction team arrived, the deputies were able to remove appellant from his cell and place a spit hood over his head. Deputies found a milk carton in appellant's cell.

Appellant was charged in an amended information with count 1, battery against a custodial officer (§ 243.1), and count 2, resisting an executive officer (§ 69). The information further alleged that appellant had suffered two prior convictions of serious felonies (§§ 667.5, subd. (c), 1192.7) and two prior strikes (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had served two prior prison terms (§ 667.5, subd. (b)).

The jury found appellant guilty of count 1 and not guilty of count 2. After the jury was excused, defense counsel indicated that appellant had two

cases pending in two different courtrooms. The trial court therefore decided to put the matter over for sentencing until the other matters were resolved.

In April 2017, the trial judge in one of appellant's other cases declared a doubt as to appellant's competency to stand trial and ordered forensic psychiatrist Risa Grand to examine appellant. Dr. Grand examined appellant on April 25, 2017, and her May report concluded that he was not competent to stand trial. Based on that report, on May 30, the trial court in the instant case suspended proceedings pursuant to section 1368. Appellant was sent to Patton State Hospital where he received antipsychotic medication.

On October 24, 2017, the medical director at Patton certified appellant as competent to stand trial under section 1372. The trial court found appellant competent and resumed the proceedings.

Appellant waived his right to a jury trial and admitted the prior conviction allegations. The trial court sentenced appellant to the mid term of two years, doubled for a total of four years. The court imposed a $40 court operations assessment, a $30 criminal conviction assessment and a $300 restitution fine, and imposed and stayed a $300 parole revocation fine. Appellant timely appealed.

DISCUSSION

I. *Competence to Stand Trial*

Appellant contends there was substantial evidence that he was incompetent to stand trial and that the trial court's failure to suspend the trial proceedings under section 1368 or vacate the jury verdict constituted reversible error. We disagree.

"The constitutional guarantee of due process forbids a court from trying or convicting a criminal defendant who is mentally incompetent to stand trial. [Citations.] Section 1367 of the Penal Code, incorporating the applicable constitutional standard, specifies that a person is incompetent to stand trial 'if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.' [Citations.]

"Penal Code section 1368 requires that criminal proceedings be suspended and competency proceedings be commenced if 'a doubt arises in the mind of the judge' regarding the defendant's competence [citation] and defense counsel concurs [citation]. [The California Supreme Court] has construed that provision, in conformity with the requirements of federal constitutional law, as meaning that an accused has the right 'to a hearing on present sanity if he comes forward with substantial evidence that he is incapable, because of mental illness, of understanding the nature of the proceedings against him or of assisting in his defense.' [Citation.] 'Once such substantial evidence appears, a doubt as to the sanity of the accused exists, no matter how persuasive other evidence—testimony of prosecution witnesses or the court's own observations of the accused—may be to the contrary.' [Citation.] . . . [S]ubstantial evidence for this purpose is evidence 'that raises a reasonable or bona fide doubt' as to competence, and the duty to conduct a competency hearing 'may arise at any time prior to judgment.' [Citations.]" (*People v. Rodas* (2018) 6 Cal.5th 219, 230-231 (*Rodas*).)

"When the evidence casting doubt on an accused's present competence is less than substantial, . . . [i]t is within the discretion of the trial judge whether to order a competence hearing." (*People v. Welch* (1999) 20 Cal.4th

701, 742 (*Welch*).) "The doubt which triggers the obligation to order a hearing is not a subjective one, but rather a doubt determined objectively from the record. [Citation.] Thus, we must determine whether a reasonable jurist, with the benefit of the available information, would have developed a doubt about defendant's mental competence. [Citation.]" (*People v. Johnson* (2018) 21 Cal.App.5th 267, 276 (*Johnson*).)

Appellant relies on the following to argue there was evidence of his incompetency to stand trial: (1) he was housed in a mental health facility in the county jail at the time of his offense and during trial; (2) he had to be forcibly extracted from his cell after "gassing" jail personnel, which included the repeated use of pepper spray and the use of a spit hood; and (3) less than a month after the jury verdict, the court ordered forensic psychiatrist Risa Grand to examine appellant.

The fact that appellant was housed in a mental health facility is not evidence of incompetency to stand trial that would trigger a duty to hold a competency hearing. "[T]o be entitled to a competency hearing, a defendant must exhibit more than a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist defense counsel. [Citation.]" (*In re Sims* (2018) 27 Cal.App.5th 195, 208.) "[T]he evidence must bear on the defendant's competency to stand trial, rather than simply establish the existence of a mental illness that could conceivably affect his ability to understand the proceedings or assist counsel. [Citation.]" (*People v. Ghobrial* (2018) 5 Cal.5th 250, 270.) Appellant's confinement in a mental health facility therefore does not raise a reasonable doubt regarding his ability to understand the proceedings.

Nor does appellant's "forcible extraction" constitute evidence of incompetency to stand trial. The circumstances of his offense do not indicate

that appellant lacked "'the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense.' [Citation.]" (*Johnson*, *supra*, 21 Cal.App.5th at p. 276.)

Similarly, the fact that appellant was found incompetent after the trial does not establish that he was incompetent during the trial. The determination of competence is reviewed "*at the time it was made*, . . . and not by reference to evidence produced at a later date. [Citations.]" (*Welch*, *supra*, 20 Cal.4th at p. 739, italics added; see also *People v. Smith* (2003) 110 Cal.App.4th 492, 505 [noting that "the timeframe between proceedings occurring when a defendant is presumed competent and the finding of doubt as to competency can be a very brief time period," and that "proximity of time alone is not determinative"].) The evidence that appellant was found incompetent after trial does not necessarily suggest that he was incompetent during trial.

Appellant has not pointed to anything in the record that would indicate that he was "'incapable, because of mental illness, of understanding the nature of the proceedings against him or of assisting in his defense.' [Citation.]" (*Rodas*, *supra*, 6 Cal.5th at p. 231; see *Johnson*, *supra*, 21 Cal.App.5th at p. 276 ["The doubt which triggers the obligation to order a hearing is not a subjective one, but rather a doubt determined objectively from the record"].) "'A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence.' [Citation.]" (*People v. Turner* (2004) 34 Cal.4th 406, 425.) There is nothing in the record that indicates appellant was unable to understand the nature of the proceedings or assist in his defense. In fact, at one point, defense counsel informed the court that appellant wanted permission to use the law library because "he does like to have a very active role in his own defense, and I have included him in every

stage so far." Similarly, when the trial court explained to appellant that he had a right to a jury trial on the prior conviction allegations and asked if he had discussed the issue with his attorney, appellant replied that he had discussed it with his attorney and wanted to waive his right to a jury trial.

The record thus shows that appellant had "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and ha[d] 'a rational as well as factual understanding of the proceedings against him.'" (*People v. Hightower* (1996) 41 Cal.App.4th 1108, 1112.) Because there was no evidence sufficient to raise a reasonable doubt about appellant's competency, the trial court did not err in failing to hold a competency hearing.

II. *Dueñas*

Appellant contends that he is indigent and that the trial court violated his right to due process by imposing assessments and a restitution fine without determining his ability to pay. He relies on *Dueñas, supra*, 30 Cal.App.5th 1157, to argue that we should vacate the assessments and impose a stay of the restitution fine until the People prove he has the ability to pay. The People contend, and we agree, that appellant has forfeited the issue by failing to raise it below.

Appellant did not object in the trial court based on the inability to pay. He contends the issue is not forfeited on appeal because the issue is a legal issue that can be raised for the first time on appeal. He further contends that it would have been futile to object in the trial court because *Dueñas* represented a dramatic and unforeseen change in the law governing assessments and restitution fines.

We agree with our colleagues in Division Eight of this Appellate District and conclude that appellant's failure to object in the trial court resulted in forfeiture of this issue. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155 (*Frandsen*); see also *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [defendant forfeited *Dueñas* issue by failing to object to fees or fine in the trial court].)

Contrary to appellant's assertion, whether a defendant has the ability to pay presents a factual issue, not a pure question of law based on undisputed facts. Moreover, similar to *Frandsen*, "nothing in the record of the sentencing hearing indicates that [appellant] was foreclosed from making the same request that the defendant in *Dueñas* made in the face of those same mandatory assessments." (*Frandsen*, *supra*, 33 Cal.App.5th at p. 1154.) As *Frandsen* reasoned, "*Dueñas* was foreseeable. *Dueñas* herself foresaw it." (*Ibid.*) We therefore reject appellant's argument that any objection would have been futile.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J. CURREY, J.